Filed 4/26/06 P. v. Sears CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PATRICK DESHAUN SEARS, Defendant and Appellant.	H028676 (Santa Clara County Super.Ct.No. CC333167)

Defendant Patrick Deshaun Sears was convicted by a jury of three counts of robbery in the second degree (Pen. Code, §§ 211-212.5, subd. (c))[1] occurring at a liquor store in south San Jose late in the evening on September 19, 2003.[2] The jury also found true the allegation that each count of robbery was committed through defendant's personal use of a firearm (§ 12022.53, subd. (b)). Defendant was sentenced to a total term of 13 years in prison as to the count 1 conviction and received concurrent 13-year sentences as to both counts 2 and 3.

On appeal, defendant asserts that there was prosecutorial misconduct at trial compelling reversal. Specifically, he contends that in closing argument, the

[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] All dates are 2003 unless otherwise specified.

prosecution improperly commented on defendant electing not to testify at trial, a violation of *Griffin v. California* (1965) 380 U.S. 609, 615 (*Griffin*). In addition, defendant argues that the prosecution during closing argument (1) made improper appeals to sympathy, (2) misstated the law, and (3) referred to a portion of a CALJIC instruction that was not given to the jury. He argues that the alleged misconduct was prejudicial and requires that his convictions be overturned.

We conclude that there was no *Griffin* error and that any prosecutorial misconduct was not prejudicial. We therefore will affirm the judgment.

FACTS

We present a summary of the evidence from the trial utilizing the applicable standard. We resolve factual conflicts in support of the verdict. (*People v. Holt* (1997) 15 Cal.4th 619, 667-668.)

I. *Prosecution Witnesses*

A. *Wahabunissa (Mary) Ahmed*

Wahabunissa (Mary) Ahmed is the co-owner of the Gavilan Bottle Shop liquor store (store or liquor store) located on Blossom Hill Road in San Jose. Mary's business partners are Dan Thompson (Dan) and Janice Thompson (Janice).[3] She became partners with the Thompsons approximately three months before the robbery at issue here.

Mary lived at the Magic Sands Mobile Home Park (Magic Sands), located across the street from the liquor store. She understood that defendant also lived at the Magic Sands, and she passed by where he lived—Space 400—several times a

[3] Because two of the store owners have the same surname, we refer to all three owners by their first names. We do so in the interests of convenience and clarity, meaning no disrespect to the witnesses.

day traveling to and from work; several times when she did so, she saw defendant outside of his home.

Defendant had also been a customer at the store before the robbery. Mary knew him by appearance and by where he lived but did not know his name. About two weeks before the robbery, defendant attempted to buy cigarettes and hard liquor at the store. She refused because defendant would not show identification, and defendant cursed at her. This instance enhanced Mary's ability to recognize defendant when she saw him again.[4]

Mary and the Thompsons were present in the liquor store at approximately 11:00 p.m. on September 19. Mary observed a young (around 20 years old) African-American enter the store, wearing a do-rag and a black mesh mask covering his face below his eyes. She estimated that he was around five feet, four inches to five feet, five inches tall.

The man first pointed a gun at Dan and commanded, "Hands up." He then pointed the gun at Mary, and finally at Janice. (The gun was black and about six to eight inches long. Mary identified the gun from a picture shown to her by the police several days after the robbery.) He directed Mary to go behind the counter, and followed her as she did so. He then put the gun to her right temple and demanded that she open the cash register and give him all the money in it. Mary complied (as she was afraid he would kill her),[5] and, while Janice held a brown bag, they both placed money taken from one or both of the store registers into that

[4] Defendant came into the store one time after this event and before the robbery. Because he had "cussed at" her, Mary paid more attention to him.

[5] At some point, the man commanded that they hurry up and give him the cash, saying that he would "count[] until ten or [he would] shoot [them] all."

bag. After Mary gave the robber the bag of money, he left the store through the front entrance and turned left.[6] The entire incident took less than four minutes.

Mary testified repeatedly that she recognized defendant as her neighbor and regular customer as soon as she saw him enter the store on the evening of the robbery. She also recognized defendant's voice at the time because she had heard it on previous occasions when he had visited the store. Mary explained that she could see the perpetrator's eyes and could see his face through the mask, which was "like a bridal veil." She also looked at his face out of the corner of her eye as he held the gun to her right temple.[7] (She was less than 18 inches from the man's face.) Mary testified that it is common in her country of origin (India) for people to wear masks covering their faces; she was thus accustomed to recognizing people by looking at their eyes.[8]

Mary told the police immediately after the robbery that defendant was the perpetrator.[9] She offered to take the police to defendant's residence. When the police showed defendant to her that night, she immediately and positively identified him as the perpetrator.[10]

---

[6] Outside and to the left of the store (as one looks from inside the store to the outside) was a small pedestrian gate that serves as an entrance to Magic Sands. When she drove by the gate with her mother that night after the robbery, Mary noticed that it was open.

[7] Officer Michael Johnson testified that Mary told him on the evening of the crime that the suspect had placed the barrel of the gun into her left temple.

[8] Although the record does not reflect Mary's age, she moved to the United States in approximately 1990.

[9] Mary also identified at trial several photographs (and several blowups of them) taken of the suspect while the offenses were in progress; she identified defendant as the person depicted in the photographs.

[10] The police initially took Mary to the Magic Sands and showed her an individual; she told Officer Johnson that it was not the person who had robbed her.

(continued)

Mary also gave an in-court identification of defendant as the person who committed the robbery. She expressed no doubt that defendant was the person who robbed her on September 19.

B. *Janice Thompson*

Janice Thompson, co-owner of the liquor store, was present with her husband, Dan, and Mary on the night of September 19. She observed a masked male (5 feet eight inches to 5 feet nine inches tall) enter the store with a handgun. (Janice believed that the mask was a knit pullover that covered most of the male's face, similar to a ski mask.) She recognized the male by his voice as being African-American. The male directed the three owners to put up their hands, that he was going to rob them, and pointed the gun at each of them. He said he was going to count to 10 and then start shooting if the owners "didn't get the money," and he began to count. Janice was "[m]ostly frightened, [and] a little angry" when she saw the male enter her store with a gun. The male directed Mary to take the money out of the cash register. Because Mary was nervous and had difficulty removing the cash, Janice helped her put the money in a bag. Janice estimated that the robber took between five hundred to seven hundred dollars from the store. She could not identify the person who committed the robbery.[11]

As the robbery was occurring, Janice pulled out a dollar bill from the register that tripped a camera maintained at the store by the San Jose Police Department. The police later retrieved the film from the camera.

C. *Dan Thompson*

It was only after this occurrence that Mary offered to take the police to defendant's residence.

[11] Janice never worked the cash register and did not have much contact with store customers.

On the evening of September 19, Dan Thompson was at the liquor store with his two co-owners, Janice and Mary. At approximately 11:15 p.m., a masked male wearing a do-rag entered the store with a semiautomatic handgun in his right hand. (The mask was knit and covered the male's face, except for his eyes and nose.) Dan believed that the male was African-American, based on the sound of his voice. The male pointed the gun at Dan and told him to get his hands up. He threatened to shoot if the owners didn't put all the money into a bag by the count of ten, and ordered Mary and Janice to "put the money in the bag real fast." The robber took approximately five hundred to six hundred dollars from the store that night.[12]

Dan thought at the time that the male's voice "seemed familiar, but [he] didn't really recognize who it belonged to." After the male left and Mary told Dan that she thought it was her neighbor, Dan then recognized the voice as being defendant's. Dan knew defendant before September 19, because he had been into the store 20 to 30 times over a two-year period. Mary had had a previous problem with defendant, so Dan had written down defendant's name and address.

D. *Officer Rick Foster*

San Jose Police Officer Rick Foster[13] was dispatched to Space 400 of the Magic Sands on September 19, at approximately 11:50 p.m. He served as backup; he waited at the side of the mobile home while fellow officers went to the front door to determine if a robbery suspect was inside the unit.

---

[12] Based on the testimony of Dan and Janice, the evidence was that the amount of money taken from the store was between $500 and $700. But we note a discrepancy between that evidence and argument of counsel: The deputy district attorney in closing argument stated on three occasions that over $1,200 was taken from the store.

[13] Each of the four police officers we refer to in this opinion was with the San Jose Police Department.

At some point that evening, Officer Foster conducted a search of the alley behind the mobile home to locate any weapon that might have been discarded. (The alley was adjacent to the back side of the mobile home unit in Space 400, and the unit had three windows facing the alley.) During that search, he found among tomato plants in the yard a white T-shirt that, on inspection, was wrapped around a gun. The gun was not rusty, appeared to have been taken care of, and was not of a type that would have been discarded. Officer Foster found no money during his search.

E. *Sergeant Ray Barrera*

Sergeant Ray Barrera responded to the robbery at the liquor store at approximately 11:30 p.m. on September 19. He went to the site where it was thought that the suspect was located, the Magic Sands, Space 400. Along with several other police officers, Sergeant Barrera knocked on the front door, and after one to two minutes, defendant opened the door, wearing only boxer shorts. Defendant's breath had a strong smell of alcohol, and he admitted that he had been drinking. The police handcuffed defendant at the door and then entered the residence to conduct a protective sweep of the premises.[14] During the course of that protective sweep, the police noted that there were approximately 10 other people in the unit. None of the other individuals on the premises matched the physical description of the suspect, and none of them was searched.

Approximately 15 to 20 minutes after defendant was handcuffed he was placed under arrest. Sergeant Barrera informed defendant that he was being arrested for committing an armed robbery at the liquor store. Defendant said that he had gone to a liquor store to buy "blacks" (cigarettes) but denied having

[14] The police had no search warrant, and neither Sergeant Barrera nor the other police officers conducted a thorough search of the premises.

committed a robbery. After defendant was arrested, Sergeant Barrera entered the premises because defendant asked him to locate some clothing that he could wear.

While Sergeant Barrera was at the scene, he spoke with Officer Foster, who identified the location in the rear of the residence (underneath a bush) where he had found a handgun, a magazine that went with the firearm, boxes of ammunition, and a white T-shirt. The gun was unloaded at the time. These items were photographed at the scene and booked into evidence.

F. *Officer Michael Johnson*

Officer Michael Johnson responded to the scene of the robbery on the night of September 19. He initially interviewed Mary, one of the victims. Mary told Officer Johnson, among other things, that she had recognized the suspect while the crime was in progress because he was a frequent customer and lived in the neighborhood. She said that she "saw [the suspect] most every day."

Officer Johnson took Mary to the Magic Sands to show her a black male adult, approximately 20 years old. (This first "show-up" identification did not take place at Space 400.) Mary almost immediately said that the person was not the suspect. Officer Johnson thereafter showed Mary a second black male—defendant—at Space 400 of the Magic Sands, asking her if the individual was the person who had robbed her. (Mary showed the officer to that location.) Upon seeing the second individual, she identified him as the robber, responding: " '[T]hat's definitely him, I swear that's him.' " The officer asked if Mary was certain, and she said, " 'I'm positive that's him.' "[15]

G. *Sergeant Michael Pomeroy*

[15] Although the transcript does not identify either of these statements by Mary as direct quotes, we infer from the context of Officer's Johnson's testimony that he was quoting what Mary told him.

Sergeant Michael Pomeroy was assigned to investigate the liquor store robbery. On September 29, he interviewed Mary. She identified the gun used during the robbery from a picture of the handgun recovered outside of defendant's home on the night of September 19.

The firearm was a Russian-made Makarov 9 millimeter semiautomatic handgun. No fingerprints were recovered from the weapon or the ammunition. Although the original serial number of the gun was scratched off, the police were able to decipher it; after running a search through CLETS—California Law Enforcement Telecommunications System, a Department of Justice databank through which lawfully owned guns are registered in California—the police determined that the handgun was registered to Gloria Anderson. Sergeant Pomeroy ascertained from a Department of Motor Vehicles search that Gloria Anderson lived at Space 400 of the Magic Sands. He determined further that she was defendant's aunt.

Sergeant Pomeroy interviewed defendant in February 2004. After he gave *Miranda*[16] warnings to defendant, he explained that he was investigating a robbery, said that a gun had been recovered from the robbery, and asked defendant if his fingerprints would be found on the gun. Defendant said that he had had access to his aunt's handgun about one year before November and would have touched the weapon at that time; he said he did not know where the gun was located. He also said that he was very familiar with guns.

H. *Recorded Telephone Conversation*

The prosecution offered excerpts of a telephone conversation recorded on September 21. The call was placed from the BC Dorm of the San Jose Jail to a

[16] *Miranda v. Arizona* (1966) 384 U.S. 436.

telephone number that was in the name of Crystelle Anderson, residing at Unit 400 of the Magic Sands.[17] (Defendant was in custody in the BC Dorm as of September 21, along with potentially as many as 87 other inmates.) In the telephone call, the person from BC Dorm identified himself by the name "Patrick" and identified the person at the other end of the conversation as "Willie."[18]

In the excerpted telephone call, the following exchange took place: "[Patrick]: . . . Did you ever check the . . . ah, bike? [¶] [Willie]: No. [¶] [Patrick]: Check on the bike by the ah, tomato plant, see if it's still all flat. Hello? [¶] [Willie]: Hum. [¶] [Patrick]: You hear me? [¶] [Willie]: Check the bike? [¶] [Patrick]: Yeah, by the tomato plant, see if it's still all flat. Remember the tire was messed up? [¶] . . . [¶] [Willie]: What'd you say, check the bike? [¶] [Patrick]: Hum. Yeah, by the tomato plant. [¶] [Willie]: They took that. [¶] [Patrick]: What? [¶] [Willie]: They took it. [¶] [Patrick]: Shhh, you talk too much."[19]

II. *Defense Witnesses*

Defendant offered no witnesses or evidence.

---

[17] Sergeant Barrera testified that when he went to the Magic Sands on the night of September 19, Crystelle Anderson gave him the telephone number for Unit 400; it was the same telephone number that "Patrick" dialed from jail two days later.

[18] Sergeant Pomeroy testified that he became familiar with defendant's voice as a result of interviewing him for five minutes in September and for approximately 22 minutes in February 2004. Both conversations were tape-recorded. After listening to the recording of the September 21 telephone call placed from jail by "Patrick," Sergeant Pomeroy concluded that the call originated from defendant.

[19] On the night of September 19, there were apparently one or more bicycles located in the alley behind the mobile home situated at Space 400. Officer Foster testified that he did not recall examining the bicycles during his search of the alley that resulted in finding the handgun.

PROCEDURAL BACKGROUND

Defendant was charged by information filed July 8, 2004, with three counts of robbery in the second degree (§§ 211-212.5, subd. (c)); the crimes were alleged to have occurred on September 19, and involved as victims Janice Thompson (count 1), Danny Thompson (count 2), and Mary Ahmed (count 3). The information alleged further that defendant committed each of the offenses by personally using a firearm (handgun), within the meaning of section 12022.53, subdivision (b).

After a jury trial, defendant was found guilty on March 1, 2005, of each of the three charges of robbery in the second degree, and the firearm-use allegations were found true as to each count. The court imposed a sentence of three years in prison for the robbery conviction (count 1), and 10 years for the firearm-use enhancement. The court also imposed concurrent sentences of three years each as to counts 2 and 3, and imposed concurrent 10-year terms for the firearms-use enhancements for each count. Defendant was therefore sentenced to a total prison term of 13 years. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant asserts that the prosecution was guilty of misconduct that was prejudicial. Defendant contends that certain statements made by the deputy district attorney during closing argument were improper for the following reasons:

1. The prosecution commented inferentially on defendant's invocation of his Fifth Amendment right not to testify. By terming as "speculation" defendant's claim that he was "misidentified" as the perpetrator of the crimes, and by arguing that the jury "didn't hear any evidence about [the misidentification]," the prosecution committed *Griffin* error and improperly shifted the burden of proof to the defense.

2. The prosecution improperly appealed to the jury's emotions by (a) arguing that the robbery involved a "[g]un to the head, one sneeze away from murder," and (b) asking the jury to speculate what might have happened had the victims possessed guns and had the situation escalated into a shootout.

3. The deputy district attorney misstated the law by arguing that a delay in the police locating the weapon allegedly used to commit the charged crimes was caused by the police needing a warrant to search defendant's residence.[20]

4. The prosecution made improper reference to CALJIC No. 2.92 by including that portion of the instructions concerning the identification of a suspect at a lineup; there was no lineup identification at issue, and the instruction, as presented in closing argument, was not given to the jury.

5. The misconduct by the prosecution was cumulatively prejudicial.

We address each of these appellate claims below.

I. *Claimed Griffin Error*

A. *Background and Contentions*

Defendant claims that the prosecution committed *Griffin* error (*Griffin*, *supra*, 380 U.S. 609) during closing argument. He contends that, at the beginning of rebuttal closing argument, the prosecution made a statement that was effectively commenting on defendant invoking his Fifth Amendment right not to testify at trial.

The relevant passage of closing argument—including argument leading up to the statement to which defendant objects and the statement itself (which is

[20] As discussed in part II section C, *post*, defendant's contention is based on the faulty assertion that the gun was discovered some length of time after the robbery and defendant's arrest.

italicized)—reads as follows: "Ms. Shamos [defense counsel] is a good attorney. I respect her, but I strongly disagree with her characterization of the evidence in this case. I'm going to tell you why. The evidence is shown quite clearly beyond a reasonable doubt that this defendant is guilty. We'll start with what I call the top ten reasons defendant is guilty. [¶] Let's start with the fact that both victims identify the defendant. *You have no evidence that it happened any other way, none. So the speculation about a misidentification, you didn't hear any evidence about that.* That somehow—"

The deputy district attorney was interrupted with a defense objection that his argument constituted *Griffin* error. After an unreported sidebar conference, the prosecution resumed by stating: "Nothing shifts the burden of proof to defense, but [defense counsel] cannot stand up here and tell you that this is a case about misidentification or race, or something else when there is no evidence of that[. B]ut no witness has taken the stand and said that at any point Mary was mistaken about the ID; . . . that Danny Thompson was mistaken about the ID; that they have problems with African-Americans; that this is about race. This is just ridiculous. There is nothing about that. In one hand[, defense counsel] called Mary Ahmed . . . adorable . . . and then she turns around and says what a liar she is. That she's lying, this is something she's made up, she's wedded to identification."

Defendant argues that the import of the prosecution's argument was that it was *defendant's* burden to disprove the testimony of the two witnesses who identified defendant as the perpetrator. Since defendant was the only other person besides the witness (Mary) who could have testified to any prior contacts between them, the argument could "only be understood as a reference to [defendant's] failure to testify and/or an attempt to shift the burden of proof." Defendant argues further that this improper argument was prejudicial, since "[t]he issue of identity was clearly the central issue in the case."

The Attorney General responds that the prosecution's argument did not constitute making either direct or indirect comment on defendant's failure to testify; instead, the deputy district attorney properly commented on the state of the evidence, specifically "the lack of evidence in support of the defense's theory that the victims misidentified [defendant] as the robber." The Attorney General further asserts that nothing said during closing argument suggested that defendant bore the burden of proof. Moreover, even if the argument was improper (the Attorney General argues), it was harmless error because the comments were brief and "much less serious" than *Griffin* errors found to be prejudicial in other cases. (*People v. Vargas* (1973) 9 Cal.3d 470. 478 (*Vargas*).)

B. *Discussion of Claim of Error*

1. *Griffin v. California*

Griffin, *supra*, 380 U.S. 609, holds that "error is committed whenever the prosecutor or the court comments upon the defendant's failure to testify. [Citation.]" (*Vargas*, *supra*, 9 Cal.3d at p. 475.) This rule applies both to direct and indirect comments on a defendant's failure to take the witness stand. (*People v. Mincey* (1992) 2 Cal.4th 408, 446.)

As explained by our high court: "[I]t is [*Griffin*] error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf. [Citations.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 371; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1339: "[A] prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand.") Thus, a prosecutor may not indirectly comment on the defendant's failure to testify by stating that there was no "denial" of the prosecution evidence, where

such denial "connote[d] a personal response by the accused himself." (*Vargas*, *supra*, 9 Cal.3d at p. 476.) Likewise, the prosecution may commit *Griffin* error by arguing that the evidence was "not refuted," where that refutation could only be made by the defendant himself or herself. (*People v. Medina* (1974) 41 Cal.App.3d 438, 457 (*Medina*); see also *People v. Modesto* (1967) 66 Cal.2d 695, 711, disapproved on another ground in *Maine v. Superior Court* (1968) 68 Cal.2d 375, 383, fn. 8 [*Griffin* error found where prosecution argued that the defendant was the only person who could explain presence of blood on his person, and he was " 'just sitting' " in courtroom].)

But a prosecutor's argument that notes the absence of defense evidence does not necessarily suggest *Griffin* error. As our high court has explained: "*Griffin*, *supra*, 380 U.S. 609, protects a defendant's right not to have the prosecutor comment on his failure to testify. A prosecutor is permitted, however, to comment on a defendant's failure to introduce material evidence or call logical witnesses. [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 554; see also *People v. Carter* (2005) 36 Cal.4th 1215, 1277.) Thus, pointing out the defense's failure to present exculpatory evidence (e.g., alibi testimony)—where the instructions and argument made clear that defendant had no burden of establishing his innocence—was held not to be *Griffin* error. (*People v. Ratliff* (1986) 41 Cal.3d 675, 690-691.) And argument challenging defense counsel to provide a reasonable interpretation of the evidence consistent with the defendant's innocence was considered not to be an impermissible comment on the defendant's failure to testify. (*People v. Stewart* (2004) 33 Cal.4th 425, 505-506.)

Thus, in *People v. Bethea* (1971) 18 Cal.App.3d 930, 936, the appellate court held that it was not *Griffin* error for the prosecution to have noted that " '[t]he state of the record is that there has been no explanation given for [the prosecution's evidence of guilt].' " The court reasoned that "[t]here is absolutely

no reference to the fact that defendant did not take the stand; nor is the remark susceptible of such interpretation by inference or innuendo." (*Ibid.*)[21]

Where the argument was allegedly an improper *indirect* comment on a defendant's failure to testify, the court must look at the evidence before the jury and the context in which the challenged statement was made to assess whether *Griffin* error occurred. (*People v. Mincey*, *supra*, 2 Cal.4th at p. 446.) Thus, in *Mincey*, the Supreme Court addressed a challenge to a prosecutor's statement that, on its face, appeared to constitute *Griffin* error, namely, " '[Defendant] was not a witness anyway.' " (*People v. Mincey*, *supra*, 2 Cal.4th at p. 446 & fn. 9.) After examining the context in which the statement was made—which included argument concerning what the defendant had told the police and the contention that the account of events that he gave to the police should be given no credence (*id.* at p. 446 & fn. 9)—the court concluded that the statement "would not have been understood by the jury as referring to, defendant's failure to testify." (*Id.* at p. 446.)

2. *Analysis of claimed Griffin error*

We conclude from a thorough review of the record, including closing arguments in their entirety, that no *Griffin* error occurred here. The deputy district attorney's comments obviously did not directly address defendant's failure to testify. And they were not an indirect comment on defendant's invocation of his Fifth Amendment rights. The prosecution's contention that defense counsel's misidentification argument was only speculation constituted proper comment upon the evidence. The statement that the jury "ha[d] no evidence that it happened any other way" did not call out defendant's failure to take the witness stand. Certainly

[21] The court's holding in *Bethea* was cited with approval by the Supreme Court in *Vargas*, *supra*, 9 Cal.3d at pages 475 to 476.

any number of witnesses—including, potentially, the approximate 10 other people who were in defendant's residence at the time he was arrested shortly after the robberies, and an eyewitness-identification expert—could have been called by defendant to testify. The prosecution did not single out a matter for which defendant was the only person who could give testimony. We conclude that these "brief comments by the prosecution during closing argument noting the absence of evidence contradicting what was produced by the prosecution on several points, and the failure of the defense to introduce material evidence . . . cannot fairly be interpreted as referring to defendant's failure to testify." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1339.)[22] Accordingly, the prosecution here did not commit *Griffin* error.

We likewise find that the prosecution's comments did not improperly shift the burden of proof to defendant. In closing argument, both the deputy district attorney (at least twice) and defense counsel (on at least eight occasions) explained that the People bore the burden of proving defendant's guilt beyond a reasonable doubt. Likewise, the court instructed the jury both at the outset of the trial[23] and

---

[22] We note that in *Bradford*, similar to the case here, the prosecutor, following a defense objection claiming *Griffin* error, reiterated to the jury that the prosecution bore the burden of proving the defendant's guilt and that the defense was not required to call witnesses. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1338.)

[23] The court advised the jury before opening statements: "The People will present evidence which they believe support[s] the charges contained in the complaint. The defendant may present evidence, but remember[,] the defendant does not have to do so. The burden is always on the People to prove every element of the offenses charged beyond a reasonable doubt. The law never imposes upon a defendant in a criminal case the burden of calling any witnesses or introducing any evidence. . . . [¶] . . . [¶] Now, a defendant in a criminal action is presumed to be innocent until the contrary is proved. And in the case of a reasonable doubt, whether his guilt is satisfactorily shown, he is entitled to an

(continued)

after closing argument that the prosecution bore this burden and that the defense was entitled to rely on the state of the evidence and the failure of the prosecution to meet its burden. The court also instructed the jury that defendant had the constitutional right not to testify, and that the jury was not allowed to draw any inference from defendant's election not to take the witness stand. And the deputy district attorney reiterated that the People bore the burden of proof in his rebuttal, immediately after making the argument that defendant claims constituted *Griffin* error. He stated: "Nothing shifts the burden of proof to defense." Under all of the circumstances presented, we simply do not view it reasonably likely that the prosecution's comments would have led the jury to believe that defendant bore the burden of proof to respond to the prosecution's evidence. (See *People v. Bradford, supra,* 15 Cal.4th at p. 1340: "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence"; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 842 [not reasonably likely jury would construe argument questioning whether " 'defense [had] been able to create a reasonable doubt' " as shifting prosecution's burden of proof to defendant].)

Cases relied on by defendant—*Vargas, supra,* 9 Cal.3d 470, and *Medina, supra*, 41 Cal.App.3d 438—do not persuade us to reach a contrary conclusion. The prosecutor in *Vargas* argued: " '[T]here is no evidence whatsoever to contradict the fact that [the third party witness] saw Mr. Vargas and [his codefendant] over [the victim]. *And there is no denial at all that they were there.* The defendants are guilty beyond any reasonable doubt . . . .' (Italics added.)"

---

acquittal. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt."

(*Vargas*, *supra*, at p. 474.) The Supreme Court reasoned that, because "[a]ny witness could 'explain' the facts, but only [the] defendant himself could 'deny' his presence at the crime scene . . . , the jury could have interpreted the prosecutor's remarks as commenting upon [the] defendant's failure to take the stand and deny his guilt." (*Id.* at p. 476.) In contrast, the deputy district attorney here did not use the word "deny," and used no such words that suggested to the jury that the absence of evidence contradicting evidence of defendant's guilt was directly due to *defendant himself* failing to testify.

Likewise, *Medina*, *supra*, 41 Cal.App.3d 438, does not support defendant's claim of error. In *Medina*, the prosecution stated in closing argument that there were five eyewitnesses to the events occurring at a double homicide in a remote location, three of whom testified and were cross-examined, and that while these three accomplice witnesses "were not of 'sterling character' . . . 'whatever else we say about them, that they are lying or otherwise, their testimony is unrefuted. No one has come forward and said that it is false. No one has come before you to show you that it wasn't that way. You have not heard that. [¶] . . . [¶] And they were up there on that stand. They were put under oath. They were subject to perjury. . . .' " (*Id.* at p. 457.) The appellate court held that this was *Griffin* error because "[t]he net effect . . . was to urge the jury to believe the testimony of the three accomplice witnesses because the defendants, who were the only ones who could have refuted it, did not take the stand and subject themselves to cross-examination and to prosecution for perjury." (*Ibid.*) Discussing and relying extensively on *Vargas*, *supra*, 9 Cal.3d 470, the court in *Medina* concluded: "[I]t is obvious that the prosecutor stepped over the bounds of proper comment upon the defendants' failure to present a defense. If reference to a lack of a ' "denial" connotes a personal response by the accused himself,' so also does the claim that the testimony was 'unrefuted.' Indeed, one of the examples given of an equivalent

comment in the court's opinion in *Vargas* is that involved in *People v. Northern* [(1967)] 256 Cal.App.2d 28, 30-31, where the prosecutor stated 'that the People's evidence "has not been refuted by the Defendant." ' Moreover, in the present case any ambiguity in this respect was removed by the prosecutor's earlier remark that there were 'five people up there on this thing,' and only three of them testified; he left no doubt as to who might have refuted the witnesses' testimony." (*Medina*, *supra*, 41 Cal.App.3d at pp. 459-460.)

The case before us bears no similarity to *Medina*. Here, the prosecution did not make reference to the testimony of particular witnesses to the events in question and thereafter state that that testimony was "unrefuted." For instance, adapting the facts in this case to the argument made in *Medina*, the deputy district attorney did *not* make the following argument (or one even approaching it): "There were four witnesses to the robberies that took place at the liquor store on the night of September 19, three of them testified, and their testimony was unrefuted." *Medina* does not compel the conclusion here that there was *Griffin* error.

We conclude therefore that the attack on the defense theory concerning misidentification as being speculative and not founded on evidence was simply a proper "comment on a defendant's failure to introduce material evidence or call logical witnesses." (*People v. Brown*, *supra*, 31 Cal.4th at p. 554.) As the argument could not reasonably be viewed as an improper prosecutorial attempt to shift the burden of proof or to allude to defendant' failure to testify, there was no *Griffin* error.

II. *Other Acts Of Alleged Prosecutorial Misconduct*

Defendant asserts that there was prosecutorial misconduct with respect to three other matters raised during closing argument that did not involve commenting on defendant asserting his Fifth Amendment rights under *Griffin*. We

first identify familiar principles concerning prosecutorial misconduct before addressing defendant's additional contentions.

A. *Prosecutorial Misconduct Generally*

As our high court has explained: " 'It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets warranted by the evidence." ' [Citations.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568.) But "[a] prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State. [Citation.] . . . [T]he prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' [Citation.] Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve. [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820; see also *People v. Hill* (1998) 17 Cal.4th 800, 819-820.)

Prosecutorial misconduct—often occurring during argument—may take a variety of forms. It may include (without limitation) mischaracterizing or misstating the evidence (*People v. Hill*, *supra*, 17 Cal.4th at p. 823); referring to facts not in evidence (*id.* at pp. 827-828); misstating the law, particularly where

done in an effort to relieve the People of responsibility for proving all elements of a crime beyond a reasonable doubt (*id.* at pp. 829-830); attacking the integrity of, or casting aspersions on defense counsel (*id.* at p. 832); intimidating witnesses (*id.* at p. 835); referring to a prior conviction of the defendant that was not before the jury (*People v. Sanchez* (1950) 35 Cal.2d 522, 529); predicting that the defendant, if not found guilty, will commit future crimes (*People v. Lambert* (1975) 52 Cal.App.3d 905, 910); stating a personal opinion, such as an opinion that the defendant is guilty (*People v. Kirkes* (1952) 39 Cal.2d 719, 724); or appealing to passions or prejudice, such as asking the jury to view the crime through the victim's eyes (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057).

The Supreme Court has explained the standards for determining whether prosecutorial misconduct mandates reversal as follows: "A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' [Citations.]" (*People v. Espinoza, supra*, 3 Cal.4th at p. 820.)

B. *Alleged Appeal To Emotions*

In the course of his initial closing argument, the deputy district attorney said, "Gun to the head, one sneeze away from murder." After a defense objection was overruled, the prosecution continued: "What if the victims, as many store owners do, had a gun? What if Janice has a gun behind the counter and a shoot out that [*sic*] ensued in a liquor store?" Defendant's objection to these latter comments was sustained.

On appeal, defendant asserts that both comments were misconduct because they represented appeals to emotion. He contends that because the element of fear was not contested at trial, the "[g]un to the head" remark was improper. And (defendant asserts further) urging the jury to speculate as to what might have happened had there been a shootout was strictly an appeal to emotion.

The trial court explained its reasons for allowing the first comment and sustaining the objection to the latter comment of the prosecution. It overruled the defense objection to the "sneeze away from murder" comment because the prosecution was "entitled to underscore the fear element of the robbery charge." The court explained further that the deputy district attorney "went too far" when he "started to argue[,] well, it could have been et cetera." It reasoned that it "need[ed] to protect against [the prosecution] going too far into passion and prejudice . . . ." The court indicated that it denied the defendant's motion for a mistrial because, while "the first part of the [prosecution's] statement was fair, . . . the second part started to head down the wrong road, but it was stopped in time." We concur with the trial court's assessment as to both matters.

First, we believe that the prosecution's "one sneeze away from murder" reference was appropriate. One element of each of the robbery charges the prosecution was required to prove was whether defendant was attempting to take property from the victims "by means of force or fear." (§ 211.) The deputy district attorney noted in his closing argument that this was one of the elements of robbery to be proved, and that the taking of property against the will of the victims here was "accomplished by force or fear clearly with a gun." The statement that defendant placed a gun to Mary's head and that she was therefore in danger of being murdered—coupled with her testimony that she was fearful that she would be killed and Janice's testimony that Mary was too frightened by having a gun held on her to quickly comply with defendant's command—properly pointed out

that the robbery was carried out "by means of force or fear" as required by section 211. And while the prosecution's choice of words—using the word "murder" instead of saying that Mary was "one sneeze away from death"—made the argument a borderline appeal to the jury's emotions, we conclude that the jury could have reasonably construed the argument as a proper emphasis of the "force or fear" element of the crime. We therefore find no error in allowing this argument.

Second, the deputy district attorney indeed crossed over the threshold of propriety by asking the jury to speculate on what might have happened had one of the store owners been armed or had there been a resulting shootout. The positing of such "what if" scenarios bore little relationship to the charged crimes and could be construed as an attempt to inflate the seriousness of the offenses based on evidence that did not exist. The court below properly sustained defendant's objection to this argument.

We disagree with defendant, however, that this improper argument compels reversal. While the invitation of the deputy district attorney for the jury to speculate as to what might have happened if one of the victims had been armed was improper, it was a brief, interrupted remark. The court—both at the beginning of the trial and after closing arguments—instructed the jury that statements of counsel were not evidence, and that the jury should "not be influenced by sentiment, conjecture, sympathy, passion, [or] prejudice." Further, defense counsel in her closing argument—referring to the prosecution's remarks as "totally improper"—reminded the jury that it should not "consider[] what could have happened."

Moreover, the prosecution's remark was not one that was particularly inflammatory. For instance, misconduct has been found where the prosecutor made blatant appeals to the sympathies and emotions of the trier of fact, such as

asking the jury to place themselves in the shoes of the victim at the time of brutal attack (*People v. Stansbury*, *supra*, 4 Cal.4th at pp. 1056-1057); requesting that the jury "reflect on all that the victim had lost through her death" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130); or asking the jury to consider if the murder victim had been one of their children (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250). The brief, interrupted comment asking the jury to consider what might have happened had defendant's actions provoked a shootout was hardly in the same league as such cases finding blatant and significant appeals to the jury's emotions.

Prosecutorial misconduct based upon improper appeals to emotion are reviewed under the *Watson*[24] standard of determining its prejudicial impact on the defendant. (*People v. Stansbury*, *supra*, 4 Cal.4th at p. 1057.) Applying that standard here, it is not a close question: It is not reasonably probable that defendant would have achieved a more favorable result in the absence of the prosecution's misconduct. (*Ibid.*)[25] We therefore find that the deputy district attorney's brief comment concerning the potential scenario of a shootout, taken in the context of the entire argument, was harmless error.

C. *Alleged Improper Argument Concerning Search Warrant*

During rebuttal argument, the deputy district attorney made the following statement: "The search. [Defense counsel] brought up the fact that [the police] can search outside. Why didn't they search inside? First because Officer Foster was outside already. He was outside already and walked back there and looked.

---

[24] *People v. Watson* (1956) 46 Cal.2d 818, 836.

[25] We also note that, notwithstanding the significant appeals by the prosecution to the emotions and passions of the jury, the Supreme Court found the misconduct harmless in *People v. Kipp*, *supra*, 26 Cal.4th at pp. 1129-1130, *People v. Stansbury*, *supra*, 4 Cal.4th at pp. 1056-1057, and *People v. Pensinger*, *supra*, 52 Cal.3d at pp. 1250-1251.

You need a search warrant to go in the house." The court sustained the defense objection and struck the last sentence. The prosecution went on to argue: "There is nothing to suggest that the way the gun was found was improper[,] that they needed a search warrant outside to find the gun. The inside of the house, they do need a search warrant." Defendant again objected, and after an unreported sidebar conference, the prosecution moved on to a new subject.

Defendant argues on appeal that it was misconduct for the prosecution to have argued that the police did not have a warrant to search defendant's premises on September 19. He contends that the People's reason for making the argument was to explain "the [police's] failure to discover the weapon on the night of the robbery." Defendant argues further that the "court's attempted rationalization" for allowing the prosecution to argue that the police had no warrant was unfounded because "there was no evidence that the police's failure to discover the weapon on the night of the robbery was motivated by the perceived need to obtain a search warrant."

Defendant's claim of error is founded on a plain misstatement of fact. The evidence was clear that Officer Foster discovered the handgun in the alley behind the mobile home where defendant lived *on the night of the robbery, September 19.* Indeed, defendant notes that discovery and its proximity in time to the robbery in the statement of facts contained in his opening brief. Defendant's contention that the prosecution made improper argument about the police not having a search warrant thus makes no sense and is rejected.[26]

---

[26] Defendant's appellate counsel should be reminded that, as an officer of the court, he has a duty "[t]o employ, for the purpose of maintaining the causes confided to him . . . those means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof. Code, § 6068, subd. (d).)

While we are not required to assist defendant with his appellate arguments, we surmise from our review of the record that defendant's *actual argument* (not articulated) is this: That it was improper for the deputy district attorney to argue that the police did not have a search warrant to explain why they discovered no money or articles of clothing at defendant's home when he was arrested. We reject any claim of prejudicial error based upon this (surmised) contention.

The court below explained to counsel after closing argument that the prosecution's allusion to the police officer's subjective belief that he needed a warrant to search the interior of defendant's residence was appropriate to explain why a more thorough search was not conducted on the evening of September 19.[27] But (the court reasoned) it was inappropriate for the People to argue that the police were not legally entitled to search the premises absent a warrant, because the jury was not instructed concerning "the Fourth Amendment and all the ins and outs of search and seizure law." We agree with the trial court that it was proper for the prosecution to argue that the officer's subjective belief that he needed a warrant explained why a thorough search of the premises was not conducted on September 19. We further concur that it was improper for the People to argue that the police were not legally entitled to conduct a full search of the premises.

---

[27] Sergeant Barrera testified that the police had no warrant to search defendant's premises on the night of the arrest. There was also some discrepancy as to the scope of the homeowner's consent given to search the residence. Sergeant Barrera said that the police had been given "limited consent" to search the premises to make sure there were no threats to the officers and to collect defendant's clothing. On cross-examination, Sergeant Barrera admitted that he was not precluded during his "security sweep" of the house from looking for evidence (such as money) that was in plain view. He also testified that he noted in the police report that the homeowner consented to a police search of defendant's room without qualifying that such consent was "limited."

During cross-examination of Officer Foster and Sergeant Barrera, defense counsel elicited testimony that the police did not discover any money or clothing worn by the robber in or around the premises on the night of defendant's arrest. To the extent the absence of such discovery was an issue, the thoroughness of the search by the police and any reason that the search was curtailed—such as the subjective belief of the officers that a search warrant was needed to conduct a complete search—were matters that were arguably relevant.

The deputy district attorney, however, crossed over the line when he argued that the police "need[ed] a search warrant" to conduct a search of the premises; this was an improper argument of the law. The jury was not instructed concerning applicable principles of search and seizure law, including exceptions to the proscription against warrantless searches, searches based on consent, or other legal issues. Indeed, in most criminal cases, a jury would never receive such instruction. Argument concerning the legalities of searches and the claimed necessity of a warrant was therefore an invitation for the jury to make a detour into irrelevant areas beyond its province and for which it had received no instructional guidance.

But we again disagree with defendant concerning the magnitude of this improper argument. It was a fleeting reference to the legalities of police searches and was unlikely, within the context of counsel's lengthy closing arguments, to have had any negative impact upon the jury. The court admonished the jury both at the beginning and end of the trial that it was required to follow the law as stated by the court, and that, in the event the attorneys said anything that conflicted with the court's instructions on the law, the court's instructions would control. And defense counsel—responding to comments by the prosecution in its initial closing argument concerning the limited nature of the police search of the premises—in essence, anticipated the improper argument, advising the jury: "The prosecutor

argued to you that officers going to that mobile home couldn't search without a search warrant. . . . [I]t's improper for him to argue what the law is that the officer has to follow." She stated further that "the prosecutor argued to you things that are not the law, and you are only to be governed by the law that the judge provides to you."

The deputy district attorney's rebuttal argument about the need for a search warrant was "brief, mild, and not repeated." (*People v. Kipp*, *supra*, 26 Cal.4th at p. 1130.) Because of the minimal impact that the argument would have had in the deliberations of the jury, we conclude that it is not reasonably probable that defendant would have achieved a more favorable result had the argument not been made.

D. *Alleged Improper Argument Concerning Inapplicable Instruction*

Defendant lastly argues that the prosecution made improper reference to jury instructions that were not among those later given by the court. Specifically, defendant argues that the deputy district attorney included a portion of CALJIC No. 2.92 in a Power Point presentation in closing argument that concerned eyewitness testimony following identification during a lineup. Because there was no lineup identification in this instance, defendant claims that it was misconduct to mention this aspect of the instruction in the prosecution's closing argument.

The record is unclear as to precisely what was presented by the prosecution during its Power Point presentation.[28] It is apparent from the context of the argument—in which the prosecution identified various factors that the jury could consider in assessing Mary's eyewitness identification of defendant as the

[28] The trial judge noted afterward that he "actually didn't see the Power Point here."

perpetrator—that the jury was shown the following portion of CALJIC No. 2.92 (Oct. 2005 ed.): "Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup." The deputy district attorney argued: "If the witness was able to identify the perpetrator by a photo or lineup. In this case they used a show-up. [Mary] was able to identify the defendant right away. Now counsel will argue—" Defense counsel promptly objected. After an unreported sidebar conference, the deputy district attorney continued: "[I]t [is] very clear we had a show-up in this case, not a lineup, not a photo. And the reason we had a show-up is because the defendant is known to the victim. You have a photo lineup or an in-person lineup when the victim doesn't know who's responsible."

The court included among its instructions to the jury CALJIC No. 2.92.[29] The instruction did not include the factor—apparently shown by the prosecution to

[29] CALJIC No. 2.92 (Oct. 2005 ed.), as given by the court in this instance, reads as follows: "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony[,] you should consider the believability of the eyewitness as well as other factors that bear upon the accuracy of the witness' identification of the defendant, including but not limited to[,] any of the following: the opportunity of the witness to observe the alleged criminal act and the perpetrator of the act; the stress, if any, to which the witness was subjected at the time of the observation; the witness' ability[,] following the observation[,] to provide a description of the perpetrator of the act; the extent to which the defendant either fits or does not [fit] the description of the perpetrator previously given by the witness; the cross[-]racial or ethnical nature of the identification; the witness' capacity to make an identification; evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act; the period of time between the alleged criminal act and the witness' identification; whether the witness had prior contacts with the alleged perpetrator; the extent to . . . which the witness is either certain or uncertain of the identification; whether the witness' identification is in fact the product of his or her own recollection; and any other evidence relating to the witness' ability to make an identification."

the jury during closing argument—that the jury could consider whether the person making the identification did so at a photographic or in-person lineup.

It would have been appropriate for the deputy district attorney to argue the significance of Mary's immediate identification of defendant in the show-up, and relate that identification to such factors in CALJIC No. 2.92 (as given by the court) as the certainty factor (i.e., "the extent to . . . which the witness is either certain or uncertain"), and the catch-all factor (i.e., "any other evidence relating to the witness' ability to make an identification"). It was improper, however, for him to have apparently shown the jury a portion of the instruction concerning photographic or in-person lineups that was neither applicable to this case nor given by the court.

This misconduct, however, was not prejudicial. As noted in part II section C, *ante*, the court twice instructed the jury that it should follow the law as provided to it by the court, and that to the extent counsel said anything that conflicted with those instructions, counsel's comments should be disregarded. And defense counsel reiterated this point. She also specifically reminded the jury that, while the prosecution referred to a lineup—calling this reference "cheating"—the jury should ignore that reference because "[t]here was not a lineup in this case. . . . A lineup and a show-up are two totally different things." Indeed, defense counsel more than effectively neutralized the People's improper inclusion of the lineup portion of CALJIC No. 2.92. She contrasted the reliability of the identification of a suspect from a lineup of multiple possible suspects with the show-up that was done in this case, also asking why the police did not have Janice attempt to identify defendant as the robber in a lineup. While we do not condone the derision (i.e., accusing the prosecution of "cheating"), we acknowledge that defense counsel's aggressive advocacy effectively negated any

negative impact, however slight, that the prosecution's reference to the inapplicable identification factor might have had.

Accordingly, we conclude that the there is no reasonable probability that defendant would have achieved a more favorable result in the absence of the improper reference by the prosecution to the inapplicable factor listed in CALJIC No. 2.92. (See *People v. Frye* (1998) 18 Cal.4th 894, 970 [prosecutorial misconduct based on remarks to jury not prejudicial unless the defendant establishes "reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner"].) Any misconduct through the prosecution's misstatement of the law was therefore not prejudicial.

III. *Whether Cumulative Error Was Harmless*

Defendant, citing *People v. Hill*, *supra*, 17 Cal.4th at pp. 845-847, contends that the cumulative effect of the alleged prosecutorial misconduct here—including the claimed *Griffin* error—was prejudicial. We disagree.

First, we note that we have rejected defendant's most serious claim of prosecutorial misconduct, namely, *Griffin* error. For the reasons discussed (see pt. I, *ante*), the argument of the deputy district attorney constituted neither comment upon defendant's election not to testify, nor an improper attempt to shift the prosecution's burden of proof to the defense.

Second, the misconduct during closing argument that we have noted—namely, the attempted appeal to emotion, misstatement of search and seizure law, and the reference to an inapplicable portion of CALJIC No. 2.92—was not harmful, either individually or collectively. Each of the three comments by the deputy district attorney was brief, mild, and adequately addressed through instruction by the court and by argument of defense counsel. Taken in the context of the entire case—giving due consideration to all evidence presented, the arguments of counsel in their entirety, and the court's instructions—the

prosecutorial misconduct here was not prejudicial. We therefore reject defendant's claim that the prosecution's improper appeal to emotions and misstatement of law was cumulatively prejudicial. The three brief, minor, improper comments by the deputy district attorney, "whether considered singly or together, did not render the . . . trial fundamentally unfair, or amount to a deceptive or reprehensible means of persuasion as to which there is a reasonable likelihood the jury was misled." (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 844.)

DISPOSITION

The judgment is affirmed.

Duffy, J.

WE CONCUR:

Mihara, Acting P.J.

McAdams, J.